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In the Supreme Court of the United States

OCTOBER TERM, 1952

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NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GAMBLE ENTERPRISES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

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The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered on May 9, 1952 (R. 395), which set aside an order of the Board dismissing a complaint against Local No. 24, American Federation of Musicians.

OPINIONS BELOW

The opinion of the court below (R. 395) is reported at 196 F. 2d 61. The findings of fact, con-

clusions of law, and order of the Board (R. 370-385, 343-367) are reported at 92 NLRB 1528.

JURISDICTION

The judgment of the court below was entered on May 9, 1952 (R. 395). The jurisdiction of this Court is invoked under 28 U. S. C: 1254 and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether it is an unfair labor practice under Section 8 (b) (6) of the National Labor Relations Act for a labor organization to attempt to secure the employment of its members for the performance of actual work, and to have the employer agree to pay for the work done, where it is the employer's position that he does not want or need the work.

STATUTE INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), is set forth *infra*, p. 10.

STATEMENT

After the usual proceedings under Section 10 of the National Labor Relations Act, the National Labor Relations Board on January 24, 1951, issued an order (R. 379) dismissing an unfair labor practice complaint (R. 6-8) which, based on charges filed by Gamble Enterprises, Inc. (R. 1-3, 4-5), alleged that Local No. 24, American Federation of

Musicians, had engaged in conduct which violated Section 8 (b) (6) of the Act. Section 8 (b) (6) makes it an unfair labor practice for a labor organization to attempt to cause an employer to pay or agree to pay money or other thing of value, "in the nature of an exaction, for services which are not performed or not to be performed." The facts pertinent to the complaint may be summarized as follows:

I. The facts

Before the decline of vaudeville in 1940, the Palace Theatre in Akron, Ohio, one of a chain of theatres owned by the Company, regularly employed a local orchestra of nine musicians, all members of the Union, to provide music for stage acts performing at the Palace (R. 61, 75, 79, 207; 208-210). Since 1940, the showing of vaudeville has been abandoned, and the Palace Theatre has been used primarily for the exhibition of motion pictures, occasionally supplemented by the appearance of traveling bands of national reputation for limited engagements (R. 346, 371-372; 101-103). Between 1940 and July 1947, whenever a traveling band appeared at the theatre, the members of the local orchestra, no longer employed on a regular basis, were paid a sum equal to the minimum union wage for a similar engagement, although they played no music on these occasions (R. 347, 372; 64-72, 79-80, 84-85, 213-214, 234). The last such payment was made to the local orchestra on July

2, 1947, over a month before August 22, 1947, the effective date of the amendments to the Act, which included Section 8 (b) (6) (R. 347, 372; 104).

Between July 2 and November 12, 1947, seven performances of name bands were presented on the stage of the Palace Theatre, and during this time the Union voiced no objection to the performances, nor did it make any demands for either the employment or the payment of local musicians (R. 347, 372; 104-105). Late in October 1947, the Union requested the Palace management to employ a "pit" orchestra composed of local musicians; proposed that the local orchestra play intermissions, overtures, and "chasers"¹ whenever a traveling band performed on stage; and stated that, unless an agreement was reached concerning the employment of local musicians, traveling bands would not be authorized to appear at the Palace² (R. 347-348, 372; 105-106). The management refused the services of a local orchestra, stating that the theatre had no need for local musicians; that their services had not been used, although paid for, in the past;

¹ Under the arrangement suggested, the local orchestra would provide "a small musical prologue before the actual show went on, and some music after the show while people were filing in and out of their seats" (R. 110).

² Article 18, Section 4, of the constitution and bylaws of the American Federation of Musicians, provides: "Traveling members cannot, without the consent of a Local, play any presentation performances in its jurisdiction unless a local house orchestra is also employed" (G. C. Exh. Nos. 3 and 23, R. 35).

and that their performance in conjunction with the appearance of a traveling band would interfere with the operation of the theatre (R. 348, 372; 105-106).

Negotiations between the Company and the Union were not resumed until late in 1948 or early in 1949 (R. 349, 373; 108, 110). On May 8, 1949, at a meeting with the management, the Union sought to obtain a guarantee that a local orchestra would be employed in some proportion to the number of engagements given traveling bands (R. 351, 373; 44-45, 110, 148-149, 159-161, 188-189, 216-218). To this end, the following alternative means were suggested by the Union: (1) that a local orchestra be stationed in the theatre pit to play an overture before, and a "shirttail" or "chaser" after, the performance of a name band, in addition to providing music during intermissions (R. 349-350, 373; 148, 216, 219); or (2) that a local orchestra, instead of the name band, be used in the pit to provide music for those vaudeville acts which were not an integral part of a name band ensemble (R. 350, 373; 148, 186-187, 218);³ or (3) that a local orchestra be given separate engagements to perform on stage with vaudeville acts booked into the

³ A distinction exists, in the entertainment field, between a "unit show," which consists of a traveling band having vaudeville acts as a regular part of its performances, and a traveling band (usually a dance band), which merely engages vaudeville acts on a temporary basis for one or more theatre engagements (R. 187, 218). The Union's proposal applied to the latter situation.

theatre by the management (R. 350, 373; 113, 219); or (4) that a local orchestra be employed and used on half of the total number of stage shows presented each year (R. 350, 373; 146-147, 188-189, 219). Every proposal made by the Union at this meeting, as well as during the entire course of negotiations, contemplated the performance of actual work by the local orchestra, and no suggestion was ever made that local musicians be paid for not working, as the theatre manager admitted in the course of the proceedings (R. 148):

Q. Now, on all of these occasions, in which [Union] members were to appear or play, [the Union representative's] suggestion was that his members actually work on those occasions, isn't that true?

A. I would imply that.

* * * * *

Q. But he said that he wanted his people to work on those occasions?

A. That is right.

Q. He never asked you to pay them for not working, for not being there?

A. That is right.

As the theatre manager further admitted (R. 155), the concurrent employment of a traveling band and a local orchestra would not have posed any problem concerning the adequacy of the theatre's physical facilities. Traveling bands cus-

tomarily perform on the stage of a theatre (R. 347, 350; 105, 162), and the Union had proposed that the local orchestra perform in the Palace pit during concurrent engagements with such organizations (*supra*, pp. 4-5). Nevertheless, the Union proposals were rejected by the Company on the ground that the services of local musicians were unnecessary, as well as economically infeasible (R. 350; 155-156, 160). The Company offered to employ a local orchestra whenever a show was presented at the Palace which was not accompanied by a traveling band, but it refused to give any assurances concerning the number of such presentations (R. 350-351, 373; 148-149, 217-218). No agreement was reached by the parties at the May 8 meeting (R. 351, 373; 44-45, 155, 160-161, 220-221).

At an ensuing meeting between the Company and the Union in December 1949, the management announced that an RKO vaudeville unit, then appearing in Youngstown, Ohio, was available for local bookings and required the services of an orchestra (R. 355-356, 374; 118-119). The Company offered to book this unit for an appearance at the Palace and to engage the local orchestra to accompany its performance. The Company conditioned this offer on the Union's assent to the subsequent appearance of a traveling band for a separate engagement at which the local orchestra would not perform (R. 356, 374; 118-119, 133-135). The proposal was entirely satisfactory to the Union, which offered to enter into a contract embodying

these terms (R. 356, 374; 120, 194, 241-243). The proposed arrangement never went into effect, however, for it was vetoed by the Company's New York office (R. 356, 374; 120, 194-195), which determines the policies governing the operation of the theatre and exercises ultimate control over matters pertaining to labor relations (R. 346, 374; 100, 139-140).

II. The Board's decision

The Board found that, after Section 8 (b) (6) went into effect in August 1947, the Union sought only to secure the employment of its members for the performance of actual work (R. 375). The Board held that, since the prohibition of Section 8 (b) (6) was limited to the causing of payment "for services which are not performed or not to be performed," that Section did not proscribe union activity aimed at securing employment and payment for the performance of actual work (R. 375-378). The Board rejected as immaterial the trial examiner's recommended finding (R. 361-362) that the services proffered by the Union were unwanted and unneeded by the Company (R. 376-378).⁴ Accord-

⁴ The examiner also recommended the finding that the services proffered by the Union were not actually to be performed by the musicians (R. 362-363). The Board rejected this recommendation as totally without support in the evidence (R. 374-375). The court below, while agreeing with the examiner that the services were unwanted and unneeded by the Company, did not disturb the Board's finding that they were actually to be performed.

ingly, the Board dismissed the ~~complaint~~ against the Union (R. 379).⁵

III. The Court's decision

The court below agreed with the examiner that the services offered by the Union were unwanted and unneeded by the theatre management as evidenced by its persistent position "that it had no need for such services, did not desire them, and that they would be a detriment rather than an advantage to it" (R. 397). It held that to "force the theatre to pay for services not needed, and of detriment to it was clearly an exaction" (R. 398). It considered immaterial the "assertion of the union that it desires to perform" (R. 398), reasoning that the "dominant purpose" of Section 8 (b) (6) was to safeguard employers from paying for unwanted and unneeded services (R. 398). Accordingly, the court below set aside the Board's order of dismissal and remanded the case to the Board "for further proceedings not inconsistent herewith" (R. 399).

⁵ The examiner also recommended that the complaint be dismissed (R. 364-366). This recommendation was premised upon his finding that the Union had ~~not~~ exerted any coercive economic pressure in aid of its demands, and that the payments sought, therefore, could not constitute an "attempt to cause" "in the nature of an exaction" within the meaning of Section 8 (b) (6). In its disposition of the case, the Board, having found that the end sought by the Union was not prohibited, had no occasion to reach the further question whether the means employed by the Union were forbidden by Section 8 (b) (6) (R. 371, 376, 383).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that, although a labor organization seeks an agreement for the payment of services actually to be performed, Section 8 (b) (6) of the Act is applicable if it is the employer's position that he does not want or need the services.
2. In failing to affirm the order of the Board dismissing the complaint.

REASONS FOR GRANTING THE WRIT

Section 8 (b) (6) of the National Labor Relations Act makes it an unfair labor practice for a labor organization or its agents:

to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

In holding that this provision precludes a union from attempting to secure actual work for its members whenever the employer takes the position that he does not want or need the work, the court below reaches a result which is in conflict not only with other circuits on a significant point in the administration of the Act but also with the wording and history of the statutory provision.

1. As stated in our memorandum in *American Newspaper Publishers Association v. National*

Labor Relations Board, No. 53, this term, in which we do not oppose the grant of the petition for a writ of certiorari limited to the question of the interpretation of Section 8 (b) (6) of the Act, the decision below conflicts with the decision of the Court of Appeals for the Seventh Circuit in the *Newspaper Publishers* case, 193 F. 2d 782, and also conflicts in principle with the decision of the Court of Appeals for the Second Circuit in *Rabouin v. National Labor Relations Board*, 195 F. 2d 906, 912-913 (C. A. 2). Unlike the court below, which regards the employer's need or desire for the work as decisive of a union's right to seek the employment of workers to do and be paid for doing it, the Seventh Circuit considers the value of the work to the employer as immaterial and looks only to whether it is to be performed. Section 8 (b) (6) cannot be intelligently administered without resolving this fundamental conflict in its interpretation.

2. The proper interpretation of Section 8 (b) (6) has widespread importance in the conduct of labor relations in the United States. If the decision below is correct, every attempt by a union to obtain additional employment, every resistance by a union to an employer's attempt to reduce his force, and every change in the work content of a particular job which a union or an employer proposes or opposes, will probably present a question whether the work in issue is within or without the

view of Section 8 (b) (6). The decision below would thus inject the Board into a nation-wide inquiry into the worth of disputed work. At the least, it would confront both the Board, and labor and management negotiators, with a constant stream of problems involving the relationship of Section 8 (b) (6) to the value and need of disputed work.

3. The court below misreads the text of Section 8 (b) (6), misconceives the import of its legislative history, and adopts a reading precisely contrary to that which Congress intended.

a. Unions are forbidden by Section 8 (b) (6) to engage in activity directed at obtaining from employers payments which (1) are "in the nature of an exaction" and (2) are made "for services which are not performed or not to be performed." Both elements are prerequisites to the making out of a violation.

The requirement that the work be "performed" is the sole statutory criterion qualifying the character of the "services" for which payment may be demanded. The distinction is between labor actually expended and no work. As the Court of Appeals for the Seventh Circuit held, "the only practice covered by § 8 (b) (6) was the practice of demanding money where no work had been done." *American Newspaper Publishers Association v. National Labor Relations Board*, 193 F. 2d 782, 801; accord, *Rabouin v. National Labor Relations Board*, 195 F. 2d 906, 912 (C. A. 2). In this

case, since the Union sought an agreement for the performance of actual work and payment for it, it did not "attempt to cause an employer to . . . agree to pay . . . for services . . . not to be performed."

The court below treats the phrase "for services which are not performed or not to be performed" as surplusage. It reads Section 8 (b) (6) as prohibiting the causing or attempting to cause payments "in the nature of an exaction," without more. Having thereby left at large what is "in the nature of an exaction," the court below innovates as a standard the want or need of the employer or a blend of the two. The substituted standard makes Section 8 (b) (6) read as a prohibition against causing or attempting to cause an employer to agree to pay "for services which, although they are performed or to be performed, are unwanted or unneeded by the employer." Nothing in the language or the legislative history warrants so basic a transformation of the words chosen by Congress to express its purpose.

b. The legislative history of Section 8 (b) (6) shows that the meaning given it by the court below is diametrically opposed to that of Congress.

Section 8 (b) (6) originated in the House of Representatives. Derived primarily from the Lea Act (60 Stat. 89, 47 U. S. C. 506), which regulated certain featherbedding practices in the radio broadcasting industry, the House bill outlawed

union activity directed at compelling employer accession to the following practices:⁶ (A) employment of more persons than reasonably required, (B) payment of money in lieu of employing such unnecessary employees, (C) payment more than once for services performed, (D) payment for services not to be performed, and (E) payment of a tax or exaction for the privilege of using any machine, equipment, or material or to agree to restrictions upon their use.

The Senate bill contained no regulation of featherbedding.⁷ In conference, the House proposal relating to unperformed work was adopted and ultimately became Section 8 (b) (6); the independent proposal relating to unneeded work was rejected. And the legislative history shows that the "need" criterion was deliberately deleted; when Congress rejected the House bill's prohibition against unnecessary work it did so on the merits and not because it believed that the additional prohibition was mere surplusage. In his major address presenting the conference agreement to the Senate (93 Cong. Rec. 6441), and in his written statement submitted contemporaneously (93 Cong. Rec. 6443), Senator Taft explained the reasons for the sharp curtailment of

⁶ H. R. 3020, 80th Cong., 1st Sess., Secs. 2 (17), 12 (a) (3) (B), April 18, 1947.

⁷ S. 1126, 80th Cong., 1st Sess., April 17, 1947.

the House bill: (1) The conferees "felt that it was impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed to me would be almost impossible"; (2) "the conferees were of the opinion that general legislation on the subject of featherbedding was not warranted at least until the joint study committee proposed by this bill could give full consideration to the matter"; (3) pending such full study, the conferees were unwilling to go further than to make it "an unlawful labor practice for a union to accept money for people who do not work. That seemed to be a fairly clear case, easy to determine...." Accordingly, except for the "fairly clear case, easy to determine," where a union accepts "money for people who do not work," Congress withheld all regulation of featherbedding.

Nevertheless, the court below expanded the scope of Section 8 (b) (6) to include unwanted or unneeded work within its ban. In support of this enlargement, the court relied on a subsequent remark made by Senator Taft, which, in the court's view, illuminates its "dominant purpose" (R. 398). This remark is (93 Cong. Rec. 6446):

It is intended to make it an unfair labor practice for a man to say, "You must have 10 mu-

sicians, and if you insist that there is room for only 6, you must pay for the other 4 anyway." That is in the nature of an exaction from the employer for services which he does not want, does not need, and is not even willing to accept.

Only by ignoring the place of this statement in the context of the debate can it have the freewheeling meaning which the court below imputes to it. After Senator Taft had made clear that the only forbidden demand was for "money for people who do not work," Senator Pepper expressed fear that, because no actual work is performed, such practices as call-in pay and paid rest periods would be banned (93 Cong. Rec. 6446). Endeavoring to reassure his colleague of the continued validity of such payments, Senator Taft used the quoted example to illustrate the difference; both situations presupposed that no actual work was done, but Senator Pepper's example depicted the kind of lack of work which was not outlawed because payment for it was not in the "nature of an exaction." Even if Senator Taft's example be taken in isolation from the debate, it would appear to refer only to payment to men who did not work:—despite the fact that there is no "room" for the four musicians to play, and therefore they would not actually work, the employer "must pay for the other 4 anyway." Considered in the context of the debate—which showed (1) that the ban against

causing the employment of unnecessary workers had already been rejected, (2) that only the causing of payment for not working was prohibited, and (3) that the colloquy between Senators Taft and Pepper was directed solely toward differentiating permissible and impermissible payments despite the failure to work—Senator Taft's example plainly presupposed that "the other 4" musicians would be paid for not working.

Any doubt is dispelled by later authoritative explanations. Senator Taft thereafter again emphasized that Section 8 (b) (6) prohibits exacting payment only "in lieu" of work (93 Cong. Rec. 6859), and Senator Ball explained that "it applied only to situations, for instance, where the Musicians' Federation forces an employer to hire one orchestra and then to pay for another standby orchestra, *which does no work at all*" (93 Cong. Rec. 7529; emphasis supplied). Accordingly, when the court below states that the analogy between Senator Taft's example and the present case "falls barely short of perfection, and reaches it if we substitute 'need' for 'room' " (R. 398), it is indulging in the same basic alteration of the legislative history of Section 8 (b) (6) as it has of the text.⁸

⁸ In the court below, the Company disclaimed the meaning which the court embraces. The Company stated "That, frankly, it appears to have been a momentary lapse in the Senator's part into the broader language of the Lea Act, to have been made in the heat of debate, and to be inconsistent

c. The court below also failed to address itself to the irreconcilable dilemma which its interpretation of Section 8 (b) (6) creates and which conclusively shows its error. If, as the court below holds, the employer's want or need for work is pertinent, a decision of this question would be required in every case. It would be necessary either (1) to have the Board decide whether the work is desired or needed, or (2) to permit the employer's unilateral determination to prevail. It is clear that neither alternative was acceptable to Congress, and that it therefore necessarily rejected any criterion of need or want, for it found no satisfactory means of resolving the issue.

As already shown (*supra*, pp. 13-15), except for the "fairly clear case, easy to determine" of accepting "money for people who do not work," Congress withheld all regulation of featherbedding, and a major reason for doing so was to avoid conferring on the Board the function of deciding the number of workers needed. To require the Board, nevertheless, to decide whether an employer wants or needs work is to cast upon it the very role which Congress refused to assign.

with the true meaning of 'in the nature of an exaction' as used in the statute" (Reply brief, p. 6). We believe it is unnecessary to explain away Senator Taft's statement in this fashion, but, if the statement does have overtones inconsistent with the text of Section 8 (b) (6) and the remainder of its legislative history, we believe that the Company has hit closer to the mark than the court.

The remaining alternative, having the employer's unilateral determination control, was no less unacceptable to Congress. The report accompanying the House bill made it clear that an employer's need for workers was to be determined, not by the employer himself, but by an impartial body applying objective standards (H. Rep. No. 245, 80th Cong., 1st Sess., 25), and the conferees, in their consideration of the wise scope of featherbedding regulation, presupposed that the Board and not the employer would determine the question of need if the legislation were to extend that far. Furthermore, reference to the Lea Act, "From which the House language was taken" (93 Cong. Rec. 6443), conclusively shows that only an impartial and objective determination was ever considered. Under the Lea Act, an employer's desires play no decisive part in determining the legality of a request for employment. 92 Cong. Rec. 1546, 1564, 3245, 3256. It is settled that "an employer's statements as to the number of employees 'needed' is not conclusive as to that question," but it must be determined by a jury on the basis of "many factors." *United States v. Pettrillo*, 332 U. S. 1; 6, 7.

Accordingly, it is plain that an employer's want or need for work is not pertinent to Section 8 (b) (6), because Congress refused to have that issue resolved by either the Board or the employer, and the deliberate absence of a means of deciding this

issue, vital to the holding below, necessarily demonstrates its irrelevance.

4. The Court of Appeals states that to make the application of Section 8 (b) (6) turn on the distinction between working and not working is "to ascribe to Congress a purpose to condemn certain practices in labor relations and at the same time to use a form of expression that permits escape from its condemnation" (R. 398). But the difference between receiving payment for working and payment for not working is more than a matter of mere syntax. *United States v. Local 807*, 315 U. S. 521, 534. Congress extended its regulation to require work, but it left to the pressure and persuasion of the bargaining process the determination whether the employer should accede to a demand for work and the manner in which work should be done to yield the employer the greatest benefit.

To interpret Section 8 (b) (6) as directed only at requiring work does not, as the court below seems to imply, permit easy evasion of the statute's actual prohibition against obtaining payment for not working. A union's mere statement that it proposes to perform work is not conclusive of the *bona fides* of its offer. Like every other question of fact, whether the union is actually in good faith offering to perform work must be evaluated in the light of all the circumstances. Whatever a union's professions may be as to its desire to secure actual

employment, "the inquiry must nevertheless be directed to whether . . . [it] honestly intended to obtain a chance to work for a wage." *United States v. Local 807*, 315 U. S. 521, 534. In this case, the Board found, after assessing all the evidence, that the Union did honestly intend to perform the work it sought, and this finding was not disturbed by the court below (*supra*, p. 8, n. 4).

For the court below to say that the same vice may arise from the unregulated as from the regulated area is to ignore the point at which Congress chose to stop. Congress fully appreciated the distinction between stand-by and make-work practices in featherbedding. Stand-by practices require payment where no work is done, which Section 8 (b) (6) forbids, while make-work practices concern payment for actual work which the employer considers of no value—which 8 (b) (6) does not reach. Because the court below refuses to follow Congress in this distinction, it does not discern the significance of the Union's change from a stand-by to what is, at worst, a make-work practice.

The court thus overlooks a vital element of the legislative process. "Legislation is often tentative, beginning with the most obvious case, and not going beyond it, or to the full length of the principle upon which its acts must be justified." Mr. Justice Holmes in *Beard v. Boston*, 151 Mass. 96, 97, 23 N. E. 826, 827. It is this "cautious advance,

step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation." Mr. Justice Holmes in *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 411. This approach is characteristic of the amendments to the Act. In "a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously." *Rabouin v. National Labor Relations Board*, 195 F. 2d 906, 912 (C. A. 2). "Congress could have outlawed all so-called 'featherbedding' but apparently did not see fit to do so" (*American Newspaper Publishers Association v. National Labor Relations Board*, 193 F. 2d 782, 801 (C. A. 7), pending on petition for a writ of certiorari, this Term, No. 53). To adopt the interpretation of the court below "would warp § 8 (b) (6) into a broader provision than it was intended to be" (*Rabouin v. National Labor Relations Board, supra*).⁹

⁹ The court below also justifies its interpretation by asserting that, while the result is that "the field of activity for a small orchestra may be somewhat curtailed," "at the same time the market for the services of much larger musical organizations is greatly enhanced" (R. 398). This is an irrelevant consideration, even if it were correct. The membership of the American Federation of Musicians is composed of musicians playing for both small and large orchestras and the policy it adopts presumably represents its considered accommodation of the interests of both, reached and embraced

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN;
Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

JULY, 1952.

by both. Neither the Board nor the courts can presume to know the best interests of different groups within a union better than they know them themselves. Nor have the Board or the courts been assigned to mediate the conflicting interests within or between the ranks of management and labor.

were paid a sum equal to the minimum union wage for a similar engagement, although they played no music on these occasions (R. 347, 372; 64-66, 68-69, 71-72, 234). The last such payment was made to the local orchestra on July 2, 1947, over a month prior to August 22, 1947, the effective date of the amendments to the National Labor Relations Act, which included Section 8 (b) (6) (R. 347, 372; 104).

Between July 2, when the last such payment was made, and November 12, 1947, seven performances of name bands were presented on the stage of the Palace Theatre. During this time the Union voiced no objection to the performances, nor did it make any demands for either the employment or the payment of local musicians (R. 347, 372; 104-105). Late in October 1947, the Union requested the Palace management to employ a "pit" orchestra composed of local musicians; proposed that the local orchestra play intermissions, overtures and "chasers"¹ whenever a traveling band performed on stage; and stated that, unless an agreement was reached concerning the employment of local musicians, traveling bands would not be authorized to appear at the Palace² (R. 347-348, 372;

¹ Under the arrangement suggested, the local orchestra would provide "a small musical prologue before the actual show went on, and some music after the show while people were filing in and out of their seats" (R. 110).

² Article 18, Section 4, of the constitution and bylaws of the American Federation of Musicians, provides: "Traveling members cannot, without the consent of a Local, play any presentation performances in its jurisdiction unless a local house orchestra is also employed" (G.C. Exh. Nos. 3 and 23, R. 35).

105-106). The management refused the services of a local orchestra, stating that the theatre had no need for local musicians; that their services had not been used, although paid for, in the past; and that their performance in conjunction with the appearance of a traveling band would interfere with the operation of the theatre (R. 348, 372; 105-106).

At the time the Union requested the employment of the local musicians, the theatre had scheduled a performance of the Ray Eberle band for November 20 (R. 348, 372; 105-106). In the course of refusing to employ a local orchestra, the theatre management stated that, if the Ray Eberle band were permitted to appear on November 20, as scheduled, the theatre would not contract for any further performances of traveling bands until an agreement could be reached with the Union (*ibid*). This proposal was unsatisfactory to the Union, and no agreement having been reached, the Ray Eberle show did not fill its engagement (R. 348-349, 372-373; 106-107). This was in accordance with union policy, whereby unless the local musicians consent, traveling bands make no local appearances (*supra*, p. 4, n. 2).

Negotiations between the Company and the Union were not resumed until late in 1948 or early in 1949 (R. 349, 373; 108; 110). On May 8, 1949, at a meeting with the management, the Union sought to obtain a guarantee that a local orchestra would be employed in some proportion to the number of engagements given traveling bands (R. 351, 373; 144-145, 110, 148-149, 159-161, 189-189, 216-218).

To this end, the following alternate forms of employment were suggested by the Union: (1) that a local orchestra be stationed in the theatre pit to play an overture before, and a "shirttail" or "chaser" after, the performance of a name band, in addition to providing music during intermissions (R. 349-350, 373; 148, 216, 219); or (2) that a local orchestra, instead of the name band, be used in the pit to provide music for those vaudeville acts which were not an integral part of a name band ensemble (R. 350, 373; 148, 186-187, 218);³ or (3) that a local orchestra be given separate engagements to perform on stage with vaudeville acts booked into the theatre by the management (R. 350, 373; 113, 219); or (4) that a local orchestra be employed and used on half of the total number of stage shows presented each year (R. 350, 373; 146-147, 188-189, 219).

Every proposal made by the Union at this meeting, as well as during the entire course of negotiations, contemplated the performance of actual work by the local orchestra, and no suggestion was ever made that local musicians be paid for not working, as the theatre manager admitted in the course of the proceedings (R. 148):

³ A distinction exists, in the entertainment field, between a "unit show," which consists of a traveling band having vaudeville acts as a regular part of its performances, and a traveling band (usually a dance band), which merely engages vaudeville acts on a temporary basis for one or more theatre engagements (R. 187, 218). The Union's proposal applied to the latter situation.

Q. Now, on all of these occasions, in which [Union] members were to appear or play, [the Union representative's] suggestion was that his members actually work on these occasions, isn't that true?

A. I would imply that.

* * * * *

Q. But he said that he wanted his people to work on those occasions?

A. That is right.

Q. He never asked you to pay them for not working, for not being there?

A. That is right.

As the theatre manager further admitted (R. 155), the concurrent employment of a traveling band and a local orchestra would not have posed any problem concerning the adequacy of the theatre's physical facilities. Traveling bands customarily perform on the stage of a theatre (R. 347, 350; 105, 162), and the Union had proposed that the local orchestra perform in the Palace pit during concurrent engagements with such organizations (*supra*, pp. 4-6).⁴

The Company rejected the Union's proposals on

⁴ Before 1940, when the local orchestra performed on a regular basis, this was the arrangement which prevailed when a traveling band appeared (*supra*, p. 3). Furthermore, since the name band and the local orchestra were to play at different times,—the name band to play its musical selections and the local orchestra to accompany vaudeville acts or to play intermissions, overtures, and "chasers"—there would be no conflict in their renditions.